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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 172

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

J. C. VAN LIEROP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Chesapeake and Ohio Railway Company, petitioner, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan entered March 10, 1953, in its Case No. 45569—*J. C. Van Lierop* v. *Chesapeake and Ohio Railway Company.*

STATEMENT OF THE MATTER INVOLVED

Petitioner is an interstate common carrier by rail.

On the 3d and 7th of January 1947 two refrigerator carloads, and on the 11th of February 1947 one refrigerator carload, of gladioli bulbs were shipped from Grants Pass,

Oregon, and delivered to respondent by petitioner some ten days to two weeks later at Hartford, Michigan (R. 467-469).

The shippers from whom respondent had bought the bulbs tendered them to the Southern Pacific Company; the Union Pacific Railroad Company and the Chicago and North Western Railway Company were intermediate carriers (R. 123-124).

As provided in the tariff and bills of lading, the cars moved 2,400 miles under carriers' protective service against cold in heater territory and under shippers' specified service against cold, coupled with standard ventilation, for the 90-mile journey beyond heater territory (R. 468-469). Heater territory includes all stations listed on pages 408-413 of Perishable Protective Tariff No. 14, I.C.C. No. 25, the only tariff governing and referred to in this case, published and filed with the Interstate Commerce Commission and admitted in evidence with effective supplements as respondent's exhibit 32 (R. 256). The tariff and supplements will be hereafter referred to as I.C.C. 25. Heater territory may be more simply defined as an area extending from a given point in a northerly direction to the Canadian border and easterly from the Pacific Coast to Chicago, Illinois.

"Carriers' protective service" is the short title commonly used to refer to the heater service offered by heater territory railroads, more accurately described as carriers' protective service against cold. Page 393, I.C.C. 25 (R. 298). The service is defined in I.C.C. 25, Item 1165, as follows:

> "Carriers' Protective Service" means that carriers will protect the shipment within the Heater Territory (see Rule 500) against frost, freezing or artificial overheating, furnishing, if necessary *artificial* heat or such other protective service as may be necessary *to obtain that result* (R. 503). (Emphasis added)

Rule 500 of I.C.C. 25 describes, *inter alia*, heater seasons and heater territory.

Ventilation is defined in Rule 300 of I.C.C. 25 as "the manipulation of hatch covers and plugs of refrigerator

cars * * * to permit or prevent the passage of air through such openings" (R. 512).

Rule 330 of I.C.C. 25 reads as follows:

(A) Ventilation in conjunction with refrigeration service or protective service against cold will be supplied only to the extent authorized in the rules governing the class of refrigeration service or protective service against cold to be furnished (R. 512).

Combinations of protective services as well as services in conjunction are sometimes permitted, but no tariff rule authorizes ventilation service in conjunction with carriers' protective service. Rule 515, I.C.C. 25 (R. 512, 513). Combination services are provided in sequence, one being canceled as the other is commenced. Rule 515 (C), I.C.C. 25. Services in conjunction are simultaneous services. Rule 514 (G), I.C.C. 25. Where necessary to dissipate surplus artificial heat, carriers will adjust ventilators, as in this case (R. 309-314). Where the commodity transported may be more susceptible to cold than to accumulated artificial heat, shippers are permitted by the tariff to instruct carriers to keep the ventilators closed. Rule 515 (D), I.C.C. 25 (R. 530).

For the 90-mile movement from Chicago, Illinois, to Hartford, Michigan, respondent's cars were under shippers' specified service (R. 420), defined in Item 1161, I.C.C. 25, as follows:

> "Shippers' Specified Service" means that protection against frost, freezing or artificial overheating will be supplied by use of heaters furnished, installed, and serviced by carriers as directed by shipper, in accordance with the provisions and charges published in Rules 513, 514, 516, 519, 526 or 527 (R. 503).

Of the rules cited in this definition only the following portion of Rule 514 is material:

Rule 514 (G):

> * * * In the absence of instructions, shipments will be handled under Standard Ventilation * * * (R. 513).

Standard ventilation in conjunction with shippers' specified service was requested for two of respondent's cars for the brief journey beyond heater territory (R. 420). There was no mention of ventilation on the bill for the third car. However, Rule 514 (G) entitled respondent to ventilation service for the third car for the short distance.

Rule 385, I.C.C. 25, requires that under standard ventilation the ventilators are to be closed at 32 degrees and opened when the outside temperature is above 32 degrees (R. 420) and refers to note 1 of Rule 385, page 385 of the tariff, in part as follows:

> Cars arriving at interchange points, junction points, intermediate hold points, at regularly assigned inspection points, also at final destination, or while being held at such points with vents open at a minimum outside temperature of 28 degrees, or with vents closed at a maximum temperature of 34 degrees, will be considered as having been properly handled.

Petitioner's records, accepted in evidence, show conclusively that at no time during the journey from Chicago, Illinois, to Hartford, Michigan, did any of the cars arrive at any of the points mentioned in note 1 of Rule 385 when the outside temperature was sufficiently high to require the ventilators to be opened, nor were they opened during this phase of the movement (R. 219-224). Respondent's witness testified that the outside temperature during the day on which the last of the cars arrived at Hartford was 33 degrees (R. 201). None of respondent's witnesses testified to outside temperatures prevailing when the second car arrived at destination, and on two occasions two of respondent's witnesses said they did not remember what the outside temperatures were when the first car arrived. (R. 208, 220).

Contrary to the statement of the Michigan Supreme Court, shippers' specified service is not rendered in heater territory (R. 505). Rule 514 (K), I.C.C. 25.

Two tariff general rules remain for consideration:

Rule No. 130:

> Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence.

Rule No. 135:

> Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.

Respondent claimed that when he opened the cars at destination steam and fumes came out, that there was moisture on the ceilings and walls, that the sacks were wet, that sprouts protruded up to three-quarters of an inch, and that the inside temperatures ranged from 90 to 100 degrees (R. 469). There is nothing in the record to show that carriers knew or should have known of these conditions while cars were in their custody.

Petitioner's witnesses, Michigan State Department of Agriculture inspectors, who in the course of their duties examined the bulbs shortly after arrival at destination and again immediately before respondent destroyed them, testified that they were compelled to condemn the bulbs after each inspection due to inherent diseases and that there was no evidence of other damage. (R. 341-346, 367-371)

Respondent alleged that none of the bulbs were fit for use and that during the month of July 1947 the entire lot was destroyed (R. 469).

Suit was commenced against petitioner by virtue of Title 49, United States Code, § 20, subsection 11, in the Van Buren County Circuit Court on September 9, 1948 (R. 8, 9). By subsequent amendment respondent claimed damages of $67,638.95, alleging that the bulbs were delivered to carriers in good condition and received by respondent in a damaged condition (R. 98). At the trial the court denied petitioner's motion for a directed verdict, made at the conclusion of respondent's case (R. 290), on the ground that by the introduction of evidence supporting his allegations respondent had made a *prima facie* case (R. 473-474).

The trial court's first reference to carriers' protective service against cold in the charge (R. 420) was not inaccurate, but a subsequent attempt to give the jury the tariff definition (R. 426) reflects the extent to which the court had been misled (R. 436). The words "and ventilation" are not in the tariff definition. Item 1165, I.C.C. 25. The jury was told that a lack of proper ventilation would sustain a finding of carrier negligence (R. 428).

For the record, but after the jury had withdrawn, the court told petitioner's counsel that his client was not chargeable with inherent or natural heating (R. 431). The jury was later told that the billed instructions referred only to artificial overheating produced by mechanical devices (R. 431-432).

The verdict was as follows:

> Unanimous verdict in favor of the plaintiff, in the amount of $41,797.46, which is sixty per cent of his estimated loss of the wholesale price at Hartford (R. 432).

In response to four questions submitted by the parties the jury found that carriers did not cause freezing or artificial overheating and that the bulbs were not diseased when shipped, but that carriers had negligently failed to ventilate the cars (R. 432).

Verdict and judgment were filed December 13, 1951 (R. 444).

Petitioner's motion for judgment notwithstanding the verdict or for a new trial was grounded, in part, on allegations that the verdict and judgment were inconsistent with the special findings and were contrary to fact and law and that there was no evidence of a negligent failure to ventilate (R. 451-456). Denying the motion on May 7, 1951, the trial court ruled that the presence of naturally generated heat and moisture and delivery of sprouted bulbs to respondent tended to establish that the bulbs were damaged through improper ventilation, that carriers' protective service against cold imposed upon petitioner and its connecting carriers a duty to ventilate in order to dissipate the naturally generated heat and moisture, and respondent's damage evidenced a breach of that duty (R. 475-476). The trial court also said the answers of the jury were consistent with the general verdict (R. 476-477). The conflicting definitions of carriers' protective service against cold were not cited in support of the motion, but on appeal to the Michigan Supreme Court were included with the above grounds by virtue of § 618.60, Michigan Compiled Laws, 1948, § 27.1040, Michigan Statutes Annotated, which permits the citing of an erroneous charge for the first time on appeal (R. 4-7; 494). Claim of appeal was filed May 15, 1951 (R. 483).

The Michigan Supreme Court did not draw a distinction between artificial overheating and inherent, natural overheating (R. 505). It alluded to the tariff prohibition against combining ventilation with carriers' protective service against cold, and held that "it was the duty of the carrier to set a standard of care necessary for the transportation of perishable commodities" (R. 503). In an opinion written by Sharpe, J., and filed March 10, 1953, the Michigan Supreme Court ruled that petitioner and its connecting carriers, in giving carriers' protective service against cold, were under a duty to ventilate if ventilation were necessary to provide a "temperature that would not cause freezing or overheating," relying upon its interpre-

tation of the holding of the Arizona Supreme Court in *Southern Pacific Company* v. *Fred Itule,* 51 Ariz. 25, 74 Pac. 2d 38, 115 A.L.R. 1268 (R. 505).

Petitioner's motion for rehearing was denied in an order of the Michigan Supreme Court dated April 16, 1953 (R. 539).

STATEMENT OF JURISDICTION

Jurisdiction of this Court to review this case by certiorari is conferred by § 1257 of United States Code, Title 28. This provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by this Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the statutes of the United States. The statute of the United States involved is the Interstate Commerce Act, § 1, *et seq.*, of United States Code, Title 49.

The Supreme Court of the State of Michigan is the highest court of that state in which a decision could be had in this case. Article Seventh, § 4, of the Constitution of Michigan of 1908; §§ 601.9-601.10, Michigan Compiled Laws of 1948.

The claim of the application of petitioner's tariff, filed with the Interstate Commerce Commission, was raised by respondent in the trial court, and an interpretation of its provisions was included in the charge to the jury and in the trial court's Memorandum of Decision (R. 256, 420, 426, 436, 468). Petitioner, on its appeal to the Supreme Court of Michigan, assigned error to the charge (R. 4-7, 494).

THE QUESTION PRESENTED

The question here presented is whether respondent is bound by petitioner's tariff which does not authorize the furnishing of ventilation service in conjunction with carriers' protective service in heater territory.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The court below erred in ruling that petitioner and its connecting carriers were under a duty to furnish a service which, under the Interstate Commerce Act and tariffs filed pursuant thereto, they could not legally furnish.

2. The court below erred in holding that the duty of petitioner and its connecting carriers was not measured by the rules and regulations of the controlling tariff.

3. The court below erred in holding that respondent was not bound by the tariff.

4. The court below erred in ruling that petitioner and its connecting carriers were under a duty to furnish a service not published and filed according to law.

5. This case involves a federal question of substance which has not heretofore been determined by this Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the Supreme Court of Michigan was reported as *J. C. Van Lierop* v. *Chesapeake and Ohio Railway Company,* 335 Mich. 702, 57 N. W. 2d 431, and appears at R. 500-508.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked by § 1257 of United States Code, Title 28.

The judgment of the Supreme Court of Michigan was rendered on March 10, 1953. Rehearing was denied in that court's order of April 16, 1953.

A detailed statement in support of the jurisdiction is contained in the petition for writ of certiorari at page 8.

STATEMENT OF THE CASE

A statement of the case was set out in detail in the petition for writ of certiorari at pages 1-8.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In ruling that petitioner and its connecting carriers were under a duty to furnish a service which, under the Interstate Commerce Act and tariffs filed pursuant thereto, they could not legally furnish.

2. In holding that respondent was not bound by petitioner's tariff.

3. In upholding as a definition of carriers' protective service a definition which does not appear in the tariff.

4. In imposing upon petitioner and its connecting carriers a duty to ventilate in conjunction with carriers' protective service, contrary to the tariff.

5. In holding that even if no instructions requesting an additional transportation service are given by the shipper, railroads must give such service if to refrain from doing so will result in damage to the shipment.

ARGUMENT

I

The Decision of the Court Below Is Not Correct

The court below erroneously ruled that, despite the fact that the controlling tariff did not authorize coupling in heater territory of ventilation service with carriers' protective service against cold, petitioner and its connecting carriers were under a duty to give the dual service to prevent overheating.

The court below gave the following reasons for its decision:

(a) Ventilation was necessary in order that the goods would not be overheated.

(b) Respondent could not order ventilation.

(c) Carriers were in sole control of the shipment.

(d) Carriers provided protection against *artificial* overheating in both territories and ventilation service in conjunction with heater service in the area beyond heater territory.

(e) Carriers were under a duty to handle the goods in a reasonably prudent manner as to all matters not covered by instructions.

A review of these reasons in the same sequence shows conclusively that they do not support the decision of the court below.

(a) The court ruled that carriers' protective service against cold included a duty to give ventilation service in heater territory for the prevention of overheating (*sic*), holding that, if in heater territory ventilation was necessary

to prevent overheating, carriers were under a duty to ventilate. It should be pointed out here that the jury found expressly that carriers did not cause the bulbs to be damaged by frost, freezing, or artificial overheating (R. 432). The court below did not distinguish between overheating produced by mechanical means and natural overheating generated by the perishables. The tariff makes this distinction. Item 1165, I.C.C. 25. And, after a fashion, the trial court made the distinction (R. 431-432). It may well be that ventilation service was necessary if the shipment was to be protected against natural heat, but the need for a service cannot impose upon carriers a duty to give it unless it is authorized in the tariff, particularly where carriers have been ordered to give another service, non-performance of which would result in damage for which carriers would certainly be liable. This assumption of an added duty would confer on respondent an unlawful preference. *Davis* v. *Cornwell*, 264 U.S. 560.

There is no obligation imposed upon a railroad to render special service, not provided in its published tariffs, to save goods in interstate movement from loss or damage—at least where it is not shown that the carrier knew or should have known of conditions requiring emergency action. *Dolan Fruit Co.* v. *Davis*, 111 Neb. 322, 196 N.W. 168, 32 A.L.R. 107; *Clemons Produce Co.* v. *Denver & R. G. R. Co.*, 203 Mo. App. 100, 219 S.W. 660. And where such knowledge was present and the special service would have been furnished solely to prevent loss, it has been held that performance of the service would have been an illegal preference and violative of the Interstate Commerce Act. *Dolan Fruit Co.* v. *Davis, supra.*

Because the nature of heater territory, in which carriers' protective service is given, is such that application of a ventilation service sufficiently effective to prevent an accumulation of the type of heat naturally

generated by perishables would defeat the purpose for which the protective (heater) service was instituted, heater territory railroads will not undertake to give a ventilation service for the dissipation of naturally generated heat simultaneously with the heater service and so stipulate in the tariff. Item 1165, Rules 330 and 515, I.C.C. 25.

(b) Respondent's inability to order ventilation service in heater territory is a corollary. His sellers had requested heater service. While it is and has been petitioner's position, based upon its interpretation of the tariff, that heater service is mandatory in heater territory during the months in which these cars moved, if the Court should find that respondent's shippers could have ordered ventilation service the fact remains that they did not. They ordered heater service, and this service clearly precluded ventilation service in heater territory. They had asked for, and were entitled to, ventilation service coupled with heater service beyond heater territory, but under the tariff they could have one or the other in heater territory, but not both.

The furnishing of ventilation service in heater territory would clearly have given the respondent a preference in violation of law. *Davis* v. *Cornwell, supra; W. H. Blodget Co.* v. *New York C. R. Co.*, 261 Mass. 365, 159 N.E. 45, 55 A.L.R. 900.

(c) The control exercised by petitioner and its connecting carriers was qualified by the type of accessorial service requested by respondent's shippers and was no greater than that which has always been the basis for common carrier liability. The exception rising out of the inherent tendencies of goods carried to deteriorate has always been implicit in the historic concept. *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U.S. 416, 421, 423. The bills of lading reflect it (R. 22-23). The Interstate Commerce Commission suggested the phrasing of tariff rules 130 and 135, cited at page 5 of this petition. *Perishable Freight Investigation*, 56 I.C.C. 483.

Among the factors contributing to the error of the court below was its apparent impression that Title 49, United States Code, § 20, subsection 11, imposed insurer liability on carriers. To paraphrase, the court said that carriers should have given ventilation service if ventilation service was necessary. (R. 505) The statute cited does not deprive petitioner of the common law defense arising out of the inherent nature of perishables to deteriorate. *Adams Express Co.* v. *Croninger*, 226 U.S. 491.

(d) Tariff authorization of ventilation service coupled with a heater service in one territory cannot legalize the giving of the ventilation service in conjunction with heater service in another territory without specific tariff authorization of the coupled services. *Davis* v. *Cornwell, supra.* The case against it is stronger here, where the tariff in so many words prohibits such coupled service. Rules 330, 515, I.C.C. 25. Failing to distinguish between artificial overheating and natural overheating led the court below into the obvious error of concluding that, because heater services in both territories were designed to combat artificial overheating, *ergo* there was a duty to prevent overheating. In view of the jury's finding (R. 432), the only type of overheating which remained to be prevented, and which carriers did not protect against, was natural overheating. (R. 506)

To protect cars against artificial overheating in heater territory the adjustment of ventilators for dissipation of surplus artificial heat is occasionally necessary, as in this case (R. 309-314). Such adjustments are spasmodic and, while there is often a relation between them and the outside temperatures, the relation is not essential. In any event these erratic adjustments cannot satisfy the requirements of a ventilation service designed to control accumulation of natural heat. Rule 385, Note 1, I.C.C. 25. The court below thought that shippers' specified service, with which ventilation service could be coupled, was permitted in heater territory (R. 505). It failed to recognize the obvious

fact that the basic distinction between the territories in which respondent's cars moved prompted carriers to withhold the coupled services in one territory and permit them in another. Beyond heater territory weather conditions and terrain do not present the same compelling reasons which move heater territory railroads to refuse to couple ventilation service with heater service in their area. Along the 90-mile portion variations in elevation above sea level are minute, stations and points of interchange are not so far apart, the range of temperatures is narrower, and the temperatures are ordinarily less extreme. In this area the rendition of ventilation service will not defeat the purpose of heater service. Hence, in regions other than heater territory, carriers permit, and even encourage, the coupling of ventilation service and heater service. Rule 514 (G), I.C.C. 25. This is not to say, however, that non-existence of the distinction would justify a decision requiring carriers to furnish a transportation service not held out to the shipping public in tariffs published and filed in accordance with law. *C. & O. Ry. Co.* v. *Westinghouse C. K. & Co.*, 270 U.S. 260, 266; *Davis* v. *Cornwell, supra; Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155.

Ventilation is a transportation service. Title 49, United States Code, § 1 (3) (a).

Transportation services can be furnished by carriers only in accordance with the terms of their tariffs duly published and filed with the Interstate Commerce Commission. Title 49, United States Code, § 1, *et seq.; Dolan Fruit Co.* v. *Davis, supra.*

It, therefore, follows that, if carriers were under a duty to furnish ventilation service, coupled with heater service in heater territory, that duty will be found in the tariff.

The tariff in this case is Perishable Protective Tariff No. 14, I.C.C. No. 25.

The tariff is clear. It does not provide the coupled service. Rules 330, 515, I.C.C. 25.

(e) *Southern Pacific Co.* v. *Fred Itule,* 74 Pac. 2d 38, 115 A.L.R. 1268, is the only case relied upon by the court below for its ruling that ventilation service should have been coupled with heater service in heater territory. While it is true that, when removed from context, the broad statement attributed to the Arizona Supreme Court lends the color of logic to the decision of the court below, it becomes obvious upon reasonably careful examination that the Arizona court did not intend the construction placed upon the language quoted by the court below. The nature of this petition precludes inserting here a detailed brief of the *Itule* case, which may be found in the Record at pages 520-522. The *Itule* case is authority for petitioner's contention that the ruling of the court below is incorrect. The Arizona Supreme Court reversed and remanded in favor of defendant carrier, ruling that the trial court's charge was fatally erroneous although it imposed on the carrier a duty for less stringent than that asserted by the trial court in this case. The language relied on by the court below means, in fact, that carriers must show that they handled the shipments in accordance with shippers' instructions and that they " * * * exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen." *Southern Pacific Co.* v. *Fred Itule, supra.* In the instant case the shippers elected carriers' protective service, a method of transportation which necessarily involved heater service only. The damage resulted from natural heat generated by the perishables, if the court below was correct in saying that the damage resulted from lack of ventilation.

In upholding the trial court's definition of carriers' protective service, which was not the definition published in the tariff, the court below in effect gave its approval to the trial court's submission to the jury of a provision purportedly set forth in the tariff but which, in fact, did not appear in the tariff. The decision of the court below, in imposing upon carriers a duty to perform a service not

published in tariffs filed with the Interstate Commerce Commission, and approving a charge in which the trial court undertook to rewrite an applicable tariff provision, are clearly erroneous in light of federal law and decisions of this court cited herein.

II

The Case Involves a Federal Question of Substance

The instant shipments moved in interstate commerce pursuant to Perishable Protective Tariff No. 14, I.C.C. No. 25, published and filed with the Interstate Commerce Commission, as required by law. Title 49, United States Code, § 1, *et seq.* The question is, therefore, a federal one.

Virtually without exception, perishables move by rail in the United States under the tariff in question. *Perishable Freight Investigation,* 56 I.C.C. 452.

The application of the tariff to the respective rights of shippers and liabilities of rail carriers and the effect of such application upon the consuming public is, therefore, a question of great importance to all railroads, and a final decision thereon by this Court is a matter of general public interest.

III

The Question Has Not Heretofore Been Determined by This Court

The court below cited no decisions of this Court in support of its denial of tariff application.

This Court, it is true, has decided cases involving the application of other tariff provisions, but no analogous decisions of this Court could be found.

CONCLUSION

The only sound conclusion from the facts is that the tariff does not authorize the giving by carriers of ventilation service for the purpose of protecting against natural, heat in heater territory, in conjunction with carriers' protective service against cold; that respondent was

not entitled to have such coupled service for the protection of his goods in heater territory; that to have given this service would have subjected petitioner to a charge of granting an unlawful preference in violation of federal law; and that respondent is bound by the limitation contained in the tariff. As the decision of the court below is not correct and the case involves a federal question of substance which has not heretofore been determined by this Court, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

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